

# Order

Michigan Supreme Court  
Lansing, Michigan

December 14, 2005

Clifford W. Taylor,  
Chief Justice

ADM File No. 2004-60

Michael F. Cavanagh  
Elizabeth A. Weaver  
Marilyn Kelly  
Maura D. Corrigan  
Robert P. Young, Jr.  
Stephen J. Markman,  
Justices

Amendment of  
Rule 9.205 of the  
Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 9.205 of the Michigan Court Rules is adopted, effective January 1, 2006.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

## Rule 9.205 Standards of Judicial Conduct

(A) [Unchanged.]

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice. In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

(1)-(3)[Unchanged.]

Staff Comment: The amendment of Rule 9.205 allows the Judicial Tenure Commission to recommend and this Court to order that a disciplined judge pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint of judicial

misconduct when the judge has engaged in conduct involving fraud, deceit, intentional misrepresentation, or misleading statements to the commission, the commission's investigators, the master, or the Supreme Court. Cf. *In re Noecker*, 472 Mich 1 (2005).

The staff comment is not an authoritative construction by the Court.

CORRIGAN, J. (*concurring*). I concur in the amendment of MCR 9.205(B) to provide for assessing costs in Judicial Tenure Commission (JTC) proceedings because our Constitution authorizes it. Const 1963, art 6, § 30(2) provides:

On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. *The supreme court shall make rules implementing this section* and providing for confidentiality and privilege of proceedings. [Emphasis added.]

Our Constitution thus has authorized this Court to “make rules” to provide for the administration of these constitutional duties, just as our Constitution authorizes this Court to make rules governing civil procedure. Const 1963, art 6, § 5 (“The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state . . .”). See also *In re Chrzanowski*, 465 Mich 468, 481 (2001). A decision to authorize the assessment of costs does not correspond to creating a new mode of discipline. See, e.g., MCR 2.625. Rather, assessing costs in a JTC proceeding provides a procedural mechanism to protect governmental resources, especially when a JTC investigation requires the expenditure of additional resources because of a judge's acts of misrepresentation. Accordingly, we fulfill our constitutional mandate by implementing rules pertaining to the discipline of judges under Const 1963, art 6, § 30(2).

Additionally, assessing costs does not represent a novel departure that will commence only upon this amendment of MCR 9.205(B). See *In re Thompson*, 470 Mich 1347 (2004); *In re Trudel*, 468 Mich 1243 (2003); *In re Cooley*, 454 Mich 1215 (1997). Even if those decisions involved judges who consented to costs, the constitutionality of this Court's actions (regardless of whether an opinion discussed the point) could not turn on an individual judge's choice.

Our decision to provide for assessing costs comports with both our precedents and, more importantly, our Constitution. Under Const 1963, art 6, § 30(2), we have the authority to make rules implementing the mandate to preserve the integrity of the judiciary. Thus, this amendment of MCR 9.205(B) falls within this Court's authority.

CAVANAGH, J. (*dissenting*). I dissent from the amendment of MCR 9.205(B).

WEAVER, J. (*dissenting*). I dissent from the amendment of this court rule, MCR 9.205(B), because it is unconstitutional. The Michigan Supreme Court does not have the authority to order a judge to pay “costs, fees, and expenses” incurred by the Judicial Tenure Commission in prosecuting a complaint against the judge. By enacting this order, the majority is misusing its power of interpretation and is reading into the text of the Michigan Constitution an expansion of its specifically limited disciplinary powers.

Pursuant to Const 1963, art 6, § 30(2) this Court, upon the recommendation of the Judicial Tenure Commission, may “censure, suspend with or without salary, retire or remove a judge” from office. Const 1963, art 6, § 30(2) provides:

On recommendation of the judicial tenure commission, the supreme court may *censure, suspend with or without salary, retire or remove a judge* for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings. [Emphasis added.]

When disciplining a judge for misconduct in office, this Court cannot impose additional or different forms of discipline than that which is provided for by the text of Const 1963, art 6, § 30.

It is without question that the imposition of “costs, fees and expenses” is an additional and different form of judicial discipline. The amendment singles out certain conduct—fraud, deceit, intentional misrepresentation, and misleading statements made during judicial disciplinary proceedings—as prerequisites for the imposition of “costs, fees, and expenses.” That certain conduct does, and other conduct does not, trigger the imposition of “costs, fees, and expenses” underscores the fact that their imposition is a form of discipline. Indeed, in its support for this amendment, the Judicial Tenure Commission commented:

Sometimes it is not enough to say, “Bad judge, bad judge.” Sometimes it really is a matter of putting one’s money where one’s mouth is, in the words of the vernacular; or, more appropriately under these circumstances, of the *Court* putting the judge’s money where his mouth was. [Emphasis in original.]

Thus the concurrence's assertion that this amendment does not create a new mode of discipline is misleading and incorrect.

Further, although Const 1963, art 6, § 5 gives this Court the power to “make rules implementing” Const 1963, art 6, § 30, that provision does not give this Court the authority to impose “costs, fees and expenses” in Judicial Tenure Commission cases. Contrary to the assertion in the concurrence, the authority to “establish, modify, amend and simplify the practice and procedure” in Michigan's courts pursuant to Const 1963, art 6, § 5 is not “just” like this Court's power to “make rules implementing” Const 1963, art 6, § 30.

Const 1963, art 6, § 5 does not expand or increase the powers granted to this Court by Const 1963, art 6, § 30. The power to “implement” Const 1963, art 6, § 30 is necessarily limited by the substance of that provision.

While on the surface, imposing “costs, fees and expenses” in Judicial Tenure Commission cases may appear to be like the imposition of costs in other civil cases, in reality it is an unconstitutional creation by this Court of additional power for this Court to discipline a judge. Const 1963, art 6, § 30 dictates the extent of this Court's judicial disciplinary powers; it permits this Court to “censure, suspend with or without salary, retire or remove a judge” from office. The provision requires this Court to “implement” its substance. To write additional substance—powers of discipline (the assessment of costs, fees and expenses)—into the Constitution in the disguise of rulemaking is an abuse of power. The majority cannot legitimately implement more power than it has been given to implement by the people who ratified the 1963 Constitution, but it has done just that with this amendment.

Nor is the imposition of “costs, fees, and expenses” a form of “censure” as argued by the Judicial Tenure Commission. The rule of “common understanding” governs the interpretation of the Constitution.<sup>1</sup> The common understanding of “censure” is that it is a formal expression of rebuke or disapproval. To “censure” is to express “strong disapproval” or a “condemnation of misconduct.”<sup>2</sup> To “censure” is also defined as “a judgment involving condemnation.”<sup>3</sup> The ratifiers of the Constitution would not have commonly understood a “censure” to be a vehicle by which the prosecutor's “costs, fees, and expenses” could be imposed on a judge.

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<sup>1</sup> *Traverse City School Dist v Attorney General*, 384 Mich 390, 405 (1971).

<sup>2</sup> Webster's New World College Dictionary, Third Edition (1997).

<sup>3</sup> Webster's Third New International Dictionary (1961).

In *In re Ferrara*,<sup>4</sup> this Court removed a judge from the bench, not on the basis of the actions that led to the initial charges of judicial misconduct, but on the basis of her “misleading statements to the public and the press, her attempt to commit a fraud on the Court . . . and her unprofessional and disrespectful conduct at each stage of the proceedings.”<sup>5</sup> Similarly, in *In re Brown*,<sup>6</sup> this Court identified “misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case” as a “more serious” form of misconduct than mere delays in such discovery.<sup>7</sup> *In re Brown* and *In re Ferrara* exemplify this Court’s appropriate response, a response restrained by and obedient to the text of the Michigan Constitution, and a response that effectively addresses a judge’s fraud, deceit, misrepresentation, and misleading statements during judicial disciplinary proceedings.

Finally, although this Court has imposed costs in several judicial tenure cases, it has done so without any discussion whether the imposition of costs was constitutional. For example, in *In re Thompson*, 470 Mich 1347 (2004), the judge did not contest the imposition of \$11,117.32 in costs. In *In re Trudel*, 468 Mich 1243 (2003), the judge resigned before \$12,777.33 in costs were imposed. In *In re Cooley*, 454 Mich 1215 (1997), the judge consented to the commission's decision and recommendation, which included the assessment of \$ 3,500 in costs. Costs were also apparently assessed in three unpublished Judicial Tenure Commission cases including, *In re Somers*,<sup>8</sup> *In re Edgar*, and *In re Blodgett*.

There may be sound policy reasons for this Court to have the ability to order a judge to pay the “costs, fees, and expenses” when a judge engages in the types of behavior targeted by this amendment. However, the creation of any power to impose discipline in addition to or different from that expressly permitted by Const 1963, art 6, § 30(2) must be considered and adopted by the people of Michigan through a constitutional amendment. It is an abuse of this Court’s power of interpretation, and a misuse of its rulemaking authority, for the majority to expand its constitutionally prescribed disciplinary powers.

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<sup>4</sup> 458 Mich 350 (1998).

<sup>5</sup> *In re Ferrara*, *supra* at 372.

<sup>6</sup> 461 Mich 1291 (2000).

<sup>7</sup> *In re Brown*, *supra* at 1293.

<sup>8</sup> A censure was published in *In re Somers*, 384 Mich 320 (1971), but the censure did not include the order assessing costs.

This Court must, without question, protect the public from a corrupt judiciary and preserve the integrity of the courts. However, it must do so while acting within, not beyond, its own power.

For these reasons I dissent from the amendment.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 14, 2005

*Corbin R. Davis*

Clerk